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No. _____

In The

Supreme Court of the United States

October Term, 1982

THE FIRST NATIONAL BANK OF OMAHA, Executor of the Estate of Glenn W. McInnch, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the equal protection provisions of the Fifth and Fourteenth Amendments preclude the denial by the Federal Government of estate tax deductions for bequests for perpetual care trusts for the benefit of public, non-profit cemetery associations while at the same time it grants such deductions for similar bequests for the benefit of church-operated cemeteries.

(2) Whether federal courts are required to give full faith and credit to state enabling acts restricting the use which can be made of assets in state-authorized perpetual care trusts for public cemeteries.

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OPINIONS DELIVERED BY THE COURTS BELOW

1. United States District Court for the District of Nebraska (Albert G. Schatz, Judge).

(a) Judgment and Memorandum Opinion filed on September 16, 1981 (Exhibit "A"). The district court found that a $100,000 bequest in trust for the

benefit of a non-profit, nonsectarian, public cemetery association was not for charitable purposes and thus the bequest was not deductible for estate tax purposes under 26 U. S. C. § 2055.

2. United States Court of Appeals for the Eighth Circuit.

(a) Opinion of a three-judge panel, filed on June 28, 1982, affirming the judgment of the district court, reported at 681 F. 2d 534 (Exhibit "B"). The Court of Appeals determined that while a fund for the maintenance of cemetery plots in a non-profit, nonsectarian, public cemetery is arguably in the community's interest and thus charitable, a provision by the testator that the fund "to the extent permitted by Nebraska law" be applied first toward maintenance of the testator's family plot and then toward maintenance of the entire cemetery does not primarily serve a charitable purpose. The court declined to give meaningful effect to Section 12-509 Reissue Revised Statutes of Nebraska, 1943 restricting the use of such funds "solely for the general care, maintenance and embellishment of the cemetery."

(b) Order of July 30, 1982 denying appellant's petition for rehearing and suggestion for rehearing en banc (Exhibit "D").

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GROUNDS FOR JURISDICTION

The judgment of the United States District Court for the District of Nebraska was entered on September 16, 1981. Timely appeal was effected by petitioner to the Court of Appeals for the Eighth Circuit. Its opinion affirming the district court judgment was entered on June 28, 1982. Petitioner filed a timely petition for rehearing and suggestions for rehearing en banc which were denied by the Court of Appeals by order dated July 30, 1982.

The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (i), which authorizes the review of civil cases by writ of certiorari granted upon the petition of any party thereto after judgment of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS THE CASE INVOLVES

1. The Fifth Amendment to the United States Constitution.

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

2. The Fourteenth Amendment to the United States Constitution.

> . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 26 U. S. C. § 2055 (a).

> "For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by de-

ducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers—

> (3) to a trustee or trustees, . . . but only if such contributions or gifts are to be used by such trustee or trustees, exclusively for . . . charitable, . . . purposes. . . ."

4. *Section 12-511 Reissue Revised Statutes of Nebraska 1943.*

Perpetual special care trusts; funds; taxation; certain claims; exemptions; declaration of policy. The perpetual care funds and perpetual special care trusts shall be used and administered solely for cemetery purposes, and shall be subject to the rules prescribed by the association. They shall be exempt from taxation, execution, attachment or any other claim, lien or process whatever, if used for the purpose hereinbefore stated, and not for profit. The perpetual care funds and perpetual special care trusts authorized by section 12-510 are hereby expressly permitted and shall be deemed to be for charitable and benevolent uses. Such contributions are a provision for the discharge of a duty due from the persons contributing to the person or persons interred or to be interred in the cemetery, and likewise a provision for the benefit and protection of the public by aiding to preserve, beautify and keep cemeteries from becoming unkempt and places of reproach and desolation in the communities in which they are situated."

5. *Section 12-509 Reissue Revised Statutes of Nebraska 1943.*

"Perpetual care fund; power to establish; sources; investment; protection; disbursement of income; requirements. Such association shall have the power to establish a fund to be known as the perpetual care fund, placing therein such money as it may from time to time determine, out of its general funds; and it shall have the authority to receive gifts or bequests of

money and other personal property, and devises of real estate and interests therein, to be placed in the perpetual care fund. The principal of the perpetual care fund shall be forever held inviolate as a perpetual trust by said association, and shall be maintained separate and distinct from any other funds. The principal of the perpetual care fund shall be invested and from time to time reinvested and kept invested in securities authorized by the laws of Nebraska for the investment of trust funds, and the income earned therefrom shall be used solely for the general care, maintenance and embellishment of the cemetery, and shall be applied in such manner as the association may from time to time determine to be for the best interest of the cemetery."

STATEMENT OF THE CASE

Testator bequeathed $100,000 to a trust for the benefit of a public non-profit, nonsectarian cemetery. The trust by the terms of testator's will was to be established and administered in accordance with Nebraska Revised Statutes 12-509 and 12-511 "Perpetual Special Care Trusts." Said statutes provide the principal of said trusts shall be kept invested and "the income earned therefrom shall be used solely for the general care, maintenance and embellishment of the cemetery, and shall be applied in such manner as the association may from time-to-time determine to be in the best interests of the cemetery."

The Internal Revenue Service disallowed the $100,000 deduction for estate tax purposes. The tax was paid and the refund suit filed under § 7422 of the Internal Revenue

Code of 1954 (26 U. S. C.) and under 28 U. S. C. § 1346 (a) (1).

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Circuit Court opinion conflicts with State Court rulings and with the ruling of this Court.

Numerous state courts of last resort have ruled that trusts established for the maintenance of public, non-profit, nonsectarian cemeteries are charitable in nature and have accorded them tax exemption and longevity privileges (exemption from the rule against perpetuities) appropriate thereto.[1] On the other hand, the Internal Revenue Service

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1. *Alabama.*—Johnson v. Holifield (1885), 79 Ala. 423, 58 Am. Rep. 596 (implied).

California.—In re Lubbins Estate, 186 Cal. 326, 199 P. 15, 16, citing Corpus Juris with full approval; Matter of Estate of Edwards, 151 Cal. Rptr. 770.

Delaware.—Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 16 Del. Ch. 410, 147 A. 165; Trustees of Methodist Episcopal Church of Milford v. Williams, 96 A. 795, 6 Boyce 62.

Illinois.—Stubblefield v. Peoples Bank of Bloomington (1950), 406 Ill. 374, 94 N. E. 2d 127.

Iowa.—Chapman v. Newell (1910), 146 Iowa 415, 125 N. W. 324; Mecker v. Lawrence, 203 Iowa 409, 212 N. W. 688; Re Scott (1948), 240 Iowa 35, 34 N. W. 2d 177.

Kentucky.—Carlisle County v. Norris (1923), 200 Ky. 338, 254 S. W. 1044, 38 A. L. R. 41 (recognized).

Massachusetts.—McElwain v. Atty. Gen. (1922), 241 Mass. 112, 134 N. E. 620.

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(Rev. Ruling 67-170 1967-1 Cum. Bull. 272), the district court in this case, and the Eighth Circuit Court of Appeals have denied that status to such trusts. The Second Circuit earlier rendered a decision to the same effect (*Child v. United States*, 540 F. 2d 579). As a result, bequests to non-profit, public, non-sectarian cemeteries are routinely denied estate tax deductible status by the Internal Revenue Service. Such rulings not only are in conflict with the holdings of many state courts of last resort but are contrary to the only pronouncement on the subject by this Supreme Court wherein it ruled land held in trust for use by such a cemetery was "in the nature of a dedication for . . . a charitable use" and rendered the trust not subject to the rule against perpetuities (*Hopkins v. Grimshaw*, 165 U. S. 342, 352).

(Continued from previous page)

Missouri.—Stewart v. Coshow (1911), 238 Mo. 662, 142 S. W. 283; Newton v. Newton Burial Park, 326 Mo. 901, 34 S. W. 2d 118, citing Corpus Juris.

New Hampshire.—Tuttle's Petition, 80 N. H. 36, 112 A. 397; Drury v. Sleeper (1929), 84 N. H. 98, 146 A. 645.

New Jersey.—Bliss v. Linden Cemetery Asso. (1913), 81 N. J. Eq. 394, 87 A. 224; Parker v. Fidelity Union Trust (1944), 2 N. J. Super. 362, 63 A. 2d 902.

New York.—Re Lyon (1916),159 N. Y. S. 951, 173 App. Div. 473; In re Upham's Will, 289 N. Y. S. 518, 160 Misc. 126; In re Johnson's Estate, 265 N. Y. S. 395, 148 Misc. 218.

North Carolina.—Holton v. Elliott, 193 N. C. 708, 138 S. E. 3.

Pennsylvania.—Re Deaner (1930), 98 Pa. Super. 360 (dictum); In re Close's Estate, 26 Pa. Dist. 280, affirmed 103 A. 822, 260 Pa. 269.

Rhode Island.—Re Harris (1928), 49 R. I. 289, 142 A. 374.

Tennessee.—Bushong v. Taylor (1930), 161 Tenn. 522, 33 S. W. 2d 80.

Washington.—Tacoma v. Tacoma Cemetery (1902), 28 Wash. 238, 68 P. 723 (recognized).

This recurring issue is one which has not been but should be settled by this court.

II.

The Circuit Court ruling does not give full faith and credit to a controlling State statute.

The Eighth Circuit, although it suggested that the subject trust "is arguably in the community's interest," cited as its reason for denial of the deductions in this instance the provision in the will of the testator that

> "The earnings on the Fund established by this bequest *to the extent permitted by Nebraska law* shall be applied first toward maintenance of the McInnich family plot and the balance of the earnings shall then be used for the general beautification and maintenance of the entire cemetery." (Emphasis added.)

The court held such language established a "precedence to non-public beneficiaries" and thus did not primarily serve the interest of the community.

Such ruling did not give full faith and credit to the Nebraska Statutes pursuant to which the trust was established nor to the wording of the bequest specifically restricting any invasion for "non-public" use only "to the extent permitted by Nebraska law."

The "Nebraska law" is contained in the enabling act for such trusts and provides

> "The principal of the perpetual care fund shall be invested and from time-to-time reinvested and kept invested in securities authorized by the law of Nebraska for the investment of trust funds, and *the in-*

come earned therefrom shall be used solely for the general care, maintenance and embellishment of the cemetery and shall be applied in such manner as the association may from time-to-time determine to be in the best interests of the cemetery." (Emphasis added.)

§ 12-509 Reissue Revised Statutes of Neb. 1943.

The Circuit Court did not recognize the limitation placed on the use of the funds by the state statute under which the trust was created. This Court by its ruling should reestablish the validity of such state statutory limitations.

III.

Grant of deduction benefit to church-operated cemeteries while denying same benefit to non-profit, non-church operated cemeteries violates the U. S. Constitution.

Deductions for estate tax purposes are routinely allowed for perpetual-care fund bequests made to church-operated cemeteries.[2] The lower court's act of denying the same deduction for the subject bequest made to public, non-profit but non church-operated cemetery constitutes a denial of equal protection under the law in contravention of the due process clause of the Constitution.

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2. Estate of Elizabeth Audenried, 26 T. C. 120, 1956.
Estate of W. Robert Amick v. Commissioner, 67 USTCR 924 (1977).

CONCLUSION

For the foregoing reasons, the petitioner's application for writ of certiorari should be granted.

Respectfully submitted,

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